SUPREME COURT, U. S.
MAY 8 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1373~~ 145

LEO GEORGE BECKER
and
JAMES JUDE TAGLIA,
Petitioners,

v.

PHILCO CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

LEO GEORGE BECKER
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v.

PHILCO CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, Leo George Becker and James Jude Taglia, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the consolidated cases of Leo George Becker v. Philco Corporation and James Jude Taglia v. Philco Corporation on February 6, 1967.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit (*infra*, Appendix A) is reported at 372 F.2d 771. The opinion of the United States District Court, Northern District, Virginia (*infra*, Appendix B) in granting Respondent's Motion for Summary Judgment is reported at 234 F. Supp. 10.

JURISDICTION

The judgment of the Court of Appeals affirming the Orders of the United States District Court, granting Respondent's Motions for Summary Judgment was entered on February 6, 1967. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Is a government contractor endowed with the attributes of a Federal Agency and is it and are its employees clothed with unqualified or absolute privilege to falsely and maliciously defame other employees in reporting a loss, compromise, or suspected compromise of classified information, solely by reason of (1) having contracted with the United States Government to furnish it with supplies or services which are required and necessary to the National Defense, and (2) in connection therewith having entered into a security agreement with the United States government under the terms of which it has agreed to report the *loss, compromise,* or *suspected compromise* of classified information.

REGULATIONS INVOLVED

Under the terms of the Security Agreement involved (R III, Appendix C, *infra*) Respondent agreed to comply with the applicable provisions of the Department of Defense Industrial Security Manual for Safeguarding Classified Information. The Manual in effect at all times here pertinent, was issued, insofar as its provisions rel-

evant to issues here presented are concerned, pursuant to the provisions of Executive Order No. 10865, February 20, 1960, 25 F.R. 1583, as amended by Executive Order No. 10909 of January 17, 1961. 26 F.R. 508. The relevant provisions of Executive Order No. 10865 are:

> "Section 1.(a) The . . . Secretary of Defense, . . . shall, by regulation prescribe such specific requirements, restrictions, and other safeguards as they consider necessary to protect (1) releases of classified information to or within United States industry that relate to bidding on, or the negotiation, award, performance, or termination of contracts with their respective agencies, and (2) other releases of classified information to or within industry that such agencies have responsibility for safeguarding. So far as possible, regulations prescribed by them under the Orders shall be uniform and provide for full cooperation among the agencies concerned."

In relevant part the Manual, dated 21 September 1956, Revised 31 December 1962, stated:

> "6. Reports
>
> The contractor shall submit immediately to the cognizant security officer —
>
> (a) . . .
>
> (b) A report, classified if appropriate, of any loss, compromise or suspected compromise of classified information.
>
> * * *
>
> "14. Loss, Compromise or Suspected Compromise of Classified Information
>
> (a) . . .
>
> (b) . . .
>
> (c) . . .
>
> (d) In the event of loss, compromise, or suspected compromise of classified information outside of a facility the contractor shall establish procedures requiring that the person discovering

the loss, compromise or suspected compromise shall immediately —

(1) Notify the local office of the Federal Bureau of Investigation and furnish sufficient information to assist in identification of the information (if the loss, compromise or suspected compromise occurs outside the United States, the nearest United States authorities shall be notified in lieu of the Federal Bureau of Investigation); and

(2) Report the loss to the contractor by the fastest means of communication.

(e) The military department assigned security cognizance shall conduct such further inquiry as may be required." There are no statutes involved.

STATEMENT OF THE CASE

Petitioners were employees of Respondent, a Defense Contractor, prior to and during the early part of 1962. Respondent had also entered into a Security Agreement with the United States. (RIII, Appendix C, *infra*). Petitioners, as employees of Respondent, had been granted access authorizations (Security Clearances) to classified information; a *sine qua non* of the exercise of their responsibilities as employees of Respondent. In June of 1962, a disgruntled, discharged female employee of Respondent by the name of Patricia Poole, wrote a "poison pen" letter to Respondent alleging that Petitioners had breached Industrial Security Regulations as set forth in the Industrial Security Manual, *supra*, in the handling of two documents, allegedly classified "Secret". Petitioner Taglia was charged with having obtained, in an unauthorized manner, two Department of Defense documents marked Secret. As to one of these it was alleged that he cut the "Secret" from it; as to the other, that he handled it within the Company's offices in a manner contrary to the applicable regulations. Petitioner Becker, as manager of the Philco Corporation Office in which Petitioner

Taglia was employed, was charged with knowledge of and participation in these violations. As both Petitioners had Security Clearances, it could hardly be said that the documents were "compromised", even though the required steps for their protection were allegedly not taken. No evidence of compromise was ever adduced.

Upon receipt of this information, Respondent's Security Officer conducted an investigation of the reported circumstances, and reported his conclusions to a Vice President of the Respondent. This Vice President called Petitioners in for a discussion of the charges made by Poole, which Petitioner denied, at the conclusion of which Petitioners were led to believe they had been exonerated.[1] However, a report of the investigation was made, which did not include the poison pen letter (Petitioners have not to this day been able to see or obtain a copy of this letter), by a staff counsel for Respondent, which purported to be a finding that Petitioners were guilty of a breach of the Industrial Security Manual.

This report, after parts of it had been deleted, was informally delivered to the Department of Defense. Petitioners, and for that matter the Department of Defense, have never seen the deleted parts of the report. Nor has Respondent ever stated the reasons for this deletion, or what they consisted of. The part of the report delivered was defamatory in character, it accused the Petitioners of falsehood, and the manner and form in which it was presented was malicious. It was not a report of a loss, compromise, or suspected compromise of classified information, it was a report of an investigation and a finding of guilt.

As a result of this report, Petitioners' access authorizations (Security Clearances) were suspended, and they were discharged, as they were valueless to their employ-

[1] The District Judge stated in his decision (Appendix B) that Petitioners were accorded a full hearing by Respondent. This was not the case. It was more like a Kangaroo Court.

ers without Security Clearances. Petitioners sought and obtained a hearing before the Field Board (a single hearing officer) of the Access Authorization Review Board established by the Department of Defense pursuant to Executive Order No. 10865, February 20, 1961, 20 F.R. 1583, *supra,* as amended by Executive Order No. 10909. Copies of the Regulation setting up this Board and of the Executive Orders are reproduced at Page II of the Record. However, as that Board has no subpoena power or power to compel the testimony of witnesses, Petitioners were unable, as they have been to date, to examine the poison pen letter, to cross-examine Patricia Poole with references thereto, or to obtain the letter from Respondent, or to examine Respondent with reference to the deleted portions of the Report. The Respondent's employees who were witnesses and Patricia Poole refused to produce the documents and refused to answer questions concerning them. Nevertheless, on the basis of the report made by the "Field Board", a report which Petitioners have not been permitted to see, the Access Authorization Review Board permanently suspended their Security Clearances. Actions against the Secretary of Defense for a mandatory injunction requiring reinstatement of their Security Clearances have been instituted by Petitioners in the United States District Court for the District of Columbia and are pending there.

In the meantime Petitioners instituted separate actions for libel against Respondent in the United States District Court for the Eastern District of Virginia. Jurisdiction of that Court was based on the amount involved and diversity of citizenship. Title 28, U.S.C. § 1332 (a)(1). The District Court granted Respondent's Motions for Summary Judgment on the ground that the report was absolutely privileged.

Petitioners appealed to the United States Circuit Court of Appeals for the Fourth Circuit where the cases were consolidated. The Court of Appeals, in a single decision, affirmed the District Court.

ARGUMENT

The decision of the United States Court of Appeals for the Fourth Circuit, review of which is sought here, is based upon the following premises:

1. That by contract the Department of Defense of the United States, may delegate some of its functions to a private contractor, who thereby is endowed with the attributes of a Federal Agency; and

2. That executive heads of Federal Agencies, and their employees required to report internally, have an absolute privilege to defame or libel persons with whom they are concerned in the exercise of their duties.

Ergo, the Circuit Court concluded, Philco Corporation and its employees being required to report, have the same absolute privilege.

The Congress from time to time authorizes the Department of Defense to employ consultants and to employ contractors to supply "bodies" to perform a government function. A careful search of legislative enactments fails to disclose any statutory authority to delegate the responsibilities and authority of the Department of Defense to the extent that it may be charged therewith, over internal security. In *Greene v. McElroy,* 360 U.S. 474, 79 S. Ct. 1400, 3 L. Ed. 2d 1377, this Court reviewed the then existing regulations upon the basis of which Greene's Security Clearance had been issued and revoked. In that case this Court stated at 360 U.S. 506, 507:

> "If acquiescence or implied ratification were enough to show delegation of authority to take actions within the area of questionable constitutionality, we might agree with respondents that delegation had been shown here. In many circumstances, where the Government's freedom to act is clear, and the Congress or the President has provided general standards of action and has acquiesced in administrative interpretation, delegation may be inferred. Thus, even in the absence of specific delegation,

> we have no difficulty in finding, as we do, that the Department of Defense has been authorized to fashion and apply *an industrial clearance program which affords affected persons the safeguards of confrontation and cross-examination.* But this case does not present that situation. We deal here with substantial restraints on employment opportunities of numerous persons imposed in a manner which is in conflict with our long-accepted notions of fair procedures. * * *" (italics supplied)

The Executive Order absent in the *Greene* Case is present here. But it does not authorize the delegation of the internal security function to private contractors, and if it did, the question of the authority of the President to authorize such delegation would still be present.[2]

A careful search fails to disclose any decision by this Court on the question of the right to delegate a function of the Executive Branch of the Government to a private contractor. Similarly there does not appear to be a body of decisions concerning the status of a private contractor who has entered into a Congressionally authorized contract with the United States to supply services otherwise performed by Government employees. Does such a contractor take on the protective coloring of a Federal Agency?

It is suggested that the importance of this question, not only to the internal security program, but to the duties and obligations of defense contractors having Security Agreements with the Department of Defense, requires this Court's decision.

The subsidiary question is also one which is of great importance to the internal security program. Assuming, *arguendo,* that delegation of a part of the internal secur-

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[2] It should be noted that neither the Executive Order or the regulations confer, if they could, power to subpoena witnesses or to compel testimony. In this respect the fatal defects in the system found to exist in the Greene Case are still present.

ity program to private defense contractors is authorized, and that the result thereof is to make the private contractor a quasi-Federal Agency, then, and in that event, to what extent should its reports and those of its employees be considered absolutely privileged.

This Court in *Barr v. Matteo*, 360 U.S. 564, 79 S. Ct. 1335, 3 L. Ed. 2d 1454, conferred the absolute privilege upon the head of an executive department acting within the limits of his authority. In the dissenting opinion written by the Chief Justice, with whom Mr. Justice Douglas joined, in *Barr v. Matteo*, it was argued that officials below Cabinet or equivalent rank should have only a qualified privilege, as the reasons for absolute privilege did not exist at that level. Then in *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, this Court adopted a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves *actual malice;* that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

These decisions suggest that in according to the private contractor an absolute privilege in reporting the loss, compromise or suspected compromise of classified information, the Circuit Court ignored the trend of the decisions of this Court which it treated as analogous. Since the analogy is not clear, this Court, it is submitted, should grant Certiorari to consider and decide this question as well as the question of the validity of the creation of a quasi-Federal Agency by contract, and without Congressional authorization.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9756.

Leo George Becker,
Appellant,

versus

Philco Corporation,
Appellee.

No. 9757

James J. Taglia,
Appellant,

versus

Philco Corporation,
Appellee.

APPEALS FROM THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA.
Oren R. Lewis, District Judge.

(Argued March 4, 1965. Decided February 6, 1967.)

Before HAYNSWORTH, Chief Judge, and SOBELOFF and BRYAN, Circuit Judges.

Rodolphe J. A. de Seife (Frank B. Tavenner and Robert Sheriffs Moss and Hart, Moss & Tavenner on brief) for Appellants, and Laidler B. Mackall (W. W. Koontz, Karl E. Wolf, and Steptoe & Johnson, and Boothe, Dudley, Koontz & Blankingship on brief) for Appellee.

ALBERT V. BRYAN, Circuit Judge:

This is a libel action by James Jude Taglia and Leo George Becker against their employer, Philco Corporation, for alleged defamation of them in a report made to the United States under the terms of a defense contract. On defendant's motion for summary judgment, the District Court dismissed, holding the communication absolutely privileged. We affirm.

For the production of defense materials, the United States has found it necessary to let their manufacture to private industry. In this process national security requires that the Government be assured of the maintenance of secrecy of certain information passed to and generated by the manufacturer. To this end, only such employees of the latter as are cleared by the United States are given access to this secret—classified—data. Such a contract was made with Philco on December 11, 1961. It contained the general security provisions. Among them, and the bone of this controversy, is the covenant of the contractor to keep the Government advised of every proven or even suspected compromise of this confidence.

Plaintiffs here had been approved by the Government, and their work for Philco required them to have regular access to classified papers. Indeed, their value to the company depended upon their "authorized access". A suspected breach of this obligation by them was communicated to Philco in June and July 1962. It was investigated and the result reported to the Government. In the course of the latter's inquiry, the plaintiffs' clear-

ances were temporarily suspended, awaiting the final decision of the administrative hearing guaranteed them by the regulations of the Department of Defense. As this meant the end of their usefulness to Philco, they lost in January 1963 their positions and the chance of similar employment, the principal damage claimed in this suit. The outcome of the administrative proceeding does not appear presently.

There is vagueness as well as conflict in the record as to when the suspicion was carried to Philco. For our purposes we accept the plaintiffs' averments that word was passed to the company by a disgruntled employee following discharge. It reached Philco in the early summer of 1962. The subsequent developments were summarized by the District Judge as follows:

> "[U]pon receipt thereof [of the accusation] the security officer conducted an investigation of the circumstances reported. The results of this inquiry were then turned over to Robert M. Jones, Vice President of Philco Corporation in charge of industrial relations, for action in accordance with the requirements of the Department of Defense Industrial Security Manual for safeguarding classified information and the Security Agreement with the Defense Department. Mr. Jones participated in further inquiry of the subject matter which included informing both Mr. Becker and Mr. Taglia of the nature of the report and affording them a full opportunity to be heard, and permitting them to make statements concerning the matter under investigation. A report of the matter was then made to the Defense Department by Philco Corporation. These reports and all matters in connection therewith were handled in a confidential manner."

The defense of Philco is that its report to the United States is protected by an absolute privilege two-fold grounded. First, it was a communication required of and made by Philco as an agency of the United States government; and secondly, it was the initial step in a quasi-judicial proceeding, i.e. the administrative inquiry

provided by the Defense Department as a remedy for an unjust implication. Since we hold the communication absolutely privileged on the first ground, we neither explore the mechanics of the administrative inquiry nor resolve the contention of the plaintiffs that it is not in any sense a judicial proceeding.

To start with, the agreement's pertinent provisions are these:

> "SECTION I—SECURITY CONTROLS
> "(A) The Contractor agrees to provide and maintain a system of security controls within its or his own organization in accordance with the requirements of the Department of Defense Industrial Security Manual for Safeguarding Classified Information attached hereto and made a part of this agreement. . . ."

In relevant part the Manual directs:

> "Paragraph 6. REPORTS—The contractor shall submit immediately to the cognizant security officer—
>
> * * *
>
> "(b) A report, classified if appropriate, of any loss, compromise, or *suspected* compromise of classified information.
>
> * * *
>
> "Paragraph 14.1. LOSS, COMPROMISE OR SUSPECTED COMPROMISE OF CLASSIFIED INFORMATION
> "a. The contractor shall establish procedures to insure that each loss, compromise or *suspected* compromise of classified information is immediately reported to the appropriate official of the contractor having responsibility for security within the facility. Classified information which cannot be located shall be presumed to be lost until an investigation by the cognizant military department determines otherwise.
>
> "b. Immediately upon receipt of such a report, the contractor shall initiate an inquiry to ascertain all of the circumstances of the loss or compromise. In the event of loss, a thorough search shall be conducted for the Classified information.

> "c. The contractor shall make an immediate report of the incident to the cognizant security officer in accordance with paragraph 6.b" [supra]. (Accent added.)

The requisite system for receiving charges, investigating them and transmitting reports thereof to the Defense Department was installed by Philco. Even if the libelous report was not systematically made first to the "cognizant security officer" of the Defense Department, but conveyed earlier orally to another Department official with the written report sent to the Director of the Security Program Division, Office of the Secretary of Defense, all as the plaintiffs contend, it is inconsequential. The content of the report, and not the means of its transmittal, is the gravamen of the complaints here.

To succeed in its motion, the company did not need to prove that the contents of the alleged compromising data were State or classified secrets. To expose the documents could have been a breach of the agreement and of national security. The prospect could force the defendant into the unfair dilemma of either a possible abrogation of its pledge of secrecy to the Government or abandonment of its principal defense to the libel action. Thus, too, if compellable, disclosure would enable an individual employee to destroy the vital protections written into the contract.

While these possibilities argue against the production, the overtopping reason for not requiring proof that the documents were State secrets is that it is irrelevant. These actions obviously are not premised on the character of the documents; they are based on the report of Philco to the United States. The defense at this juncture is not that the papers were classified. Judgment went for Philco not because the information comprised State secrets but because the publication of the report was clothed with immunity by law.

Nor were the plaintiffs injured by the absence of the report from the case. It was not in evidence, but the quotations from it and the denunciations of them in the plaintiffs' complaints, required the District Court to assume that the report was untrue. This hypothesis also included the plaintiffs' contention that the reported documents were of no value. It also accepted the plaintiffs' denigration of the report as an "edited", "excerpted" and "truncated" version of the intracompany memorandum which in its original form acquitted the plaintiffs of unfaithfulness to their trust.

To be predominantly emphasized here is that the contract embraces reports by Philco to the Government not only of actual but of each suspected compromise of classified information. Equally important, the company has no discretion and is mandatorily ordered to report the suspicion immediately. There is no question but that the system of reporting was valid. The obligation could scarcely be couched in more imperious or exacting language. It embraces both true and false accusations, both substantial and insubstantial suggestions, perhaps encompassing even rumors. It demands investigation of them by the company and a report of it to the Defense Department. That is precisely what Philco did. Faithful to the contract, it could have done no less. The issue, then, is whether in these circumstances Philco may be held answerable for falsity and defamation in the report.

For its absolute privilege Philco analogizes its position with that of an executive agency of the Government. The immunity conferred on a Federal officer or agency, high or low in the echelon of the executive department of the United States, and the reasons therefor, have heretofore been declared generally, surely too well for us to venture a dissertation of our own. *Barr v. Matteo*, 360 U.S. 564 (1959); *Howard v. Lyons*, 360 U.S. 593 (1959). *Matteo*, puts it pithily:

"It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties —suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government. . . ."

* * *

"The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy." [1]

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[1] "360 U.S. at 571-73 (Harlan, J., joined by 3 justices). Justice Black's concurrence, necessary to the Court's judgment, stressed the public interest, which he found satisfied by the unhindered public comment of responsible government officials, a consideration not in the case at hand."

The logic of this thesis, we think, endues Philco with the attributes of a Federal agency in the problem of this controversy. Indisputably, the Government by the contract bared and confided State secrets to Philco. The company was imparted, and it worked in, knowledge exclusively the sovereign's. It was a sharing of confidence quite aside from a subcontract for the production of defense supplies. So it was that the company and such of its employees as were confidants were answerable for keeping the nation's secrets, as fully as if they were governed by the oath of a Federal official. Closely performing his duties and charged with equal responsibility and loyalty, we think the company and its trusted personnel were imbued with the official's character, and partake of his immunity to liability, whenever and wherever he would enjoy the absolute privilege.

The further question is whether a Federal agency or employee would in the position of Philco and its trusted employees be accorded the unqualified privilege. In this determination we do not encounter the difficult resolutions—particularly the scope of the libeler's duty, and the medium used, to issue the sullying statements—which confronted the Court in Barr v. Matteo, supra, 360 U.S. 564 and Howard v. Lyons, supra, 360 U.S. 593. These are absent here for, as we have seen, no doubt existed of the right of Philco to make the communication. It was mandatory, and immediately within the province of Philco's functions. Again, here no open publication of the alleged libel was made, but only a confidential transmittal within the internal operations of the Government. These considerations would excuse a Federal agency or employee.

In *Matteo*, supra, 360 U.S. at 575, the judgment recognized the exemption of one who acts under an obligation to the Government, saying:

> "That petitioner was not *required* by law or by direction of his superiors to speak out cannot be controlling in the case of an official of policy-making rank, for the same considerations which underlie the recognition of the privilege as to acts done in connection *with a mandatory duty* apply with equal force to discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority." (Accent added.)

That an utterance plainly commanded by the duties of the author to the Government has been repeatedly recognized as unconditionally privileged is demonstrated by Preble v. Johnson, 275 F.2d 275 (10 Cir. 1960) and Standard Nut Margarine Co. v. Mellon, 72 F.2d 557 (D.C. Cir. 1934).

Although dissenting from the complete exoneration of libel granted in *Matteo*, the Chief Justice, joined by Mr. Justice Douglas, conceded that:

> "It may be assumed, *arguendo*, that a government employee should have absolute immunity when according to his duty he makes internal reports to his superior or to another upon his supeior's order. Cf. Taylor v. Glotfelty, 201 F.2d 51; Farr v. Valentine, 38 App. D.C. 413; DeArnaud v. Ainsworth, 24 App. D.C. 167. This might be a practical necessity of government that would find its justification in the need for a free flow of information within every executive department. It may not be unreasonable to assume that if a maliciously false libel is uttered in an internal report, it will be recognized as such and discredited without further dissemination." (p. 582.)

He further commented:

> "Releases to the public from the executive branch of government imply far greater dangers to the individual claiming to have been defamed than do internal libels. First, of course, a public statement—especially one arguably libelous—is normally intended for and reaches a larger audience than an internally communicated report. Even if the release can later be shown libelous, it is most unusual for a libeled person to obtain the same hearing that was available for the original press release. Second, a release is communicated to a public in no position to evaluate its accuracy; where the report is made internally, the superior is usually in a position to do so. If the report is false, the superior can undo much of the harm of the report by countermanding it or halting its spread." (p. 583)

The distinction between a public and an intramural issuance of the slander was stressed in Poss v. Lieberman, 299 F.2d 358, 360 (2 Cir. 1962):

> "There has been some uncertainty among scholars as to the reach of absolute privilege to the lower echelons of administrative employees. Cf. Prosser on Torts, 2d ed. (1955), Sec. 95, p. 612. While the language of the recent cases indicates an unlimited reach to the privilege, it may be possible that a case involving such an administrative employee at a minor grade might lead to a reexamination of the language. Plainly, though, there

> is better reason to hold the privilege absolute *when applied to reports required or permitted to be made within an agency in the normal functioning of the agency's business,* when these reports are required to be confidential as here and their disclosure would be a misdemeanor...." (Accent added.)

Finally, it may not be amiss to note that we do not decide that the plaintiffs were rightly suspended, or cannot be restored to their classified positions, or cannot recapture their lost wages. Our decision only determines that an action for libel will not lie in the circumstances against a private party fulfilling its governmentally imposed duty to inform. Presumably to correct injustice incident to the exaction of this duty, the administrative proceedings heretofore noted were provided. Whether they give adequate redress or whether other remedies are available are questions not intended to be answered here. Certainly we do not deny the existence of any such other remedies.

The judgment of the District Court will not be overturned.

Affirmed.

APPENDIX B

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Order Granting Summary Judgment

LEO GEORGE BECKER,
Plaintiff

v.

PHILCO CORPORATION,
Defendant

Civil Action No. 3081

ORDER

For the reasons set forth in the Memorandum Opinion of the Court dated September 4, 1964, the defendant's motion for summary judgment be, and it hereby is, granted, and it is ORDERED that this action be, and it hereby is, dismissed.

September 21, 1964 /s/ OREN R. LEWIS
United States District Judge

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B-2

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Order Granting Summary Judgment

JAMES J. TAGLIA,
Plaintiff

v.

PHILCO CORPORATION,
Defendant

Civil Action No. 3082

ORDER

For the reasons set forth in the Memorandum Opinion of the Court dated September 4, 1964, the defendant's motion for summary judgment be, and it hereby is, granted, and it is ORDERED that this action be, and it hereby is, dismissed.

September 21, 1964 /s/ OREN R. LEWIS
United States District Judge

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THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

LEO GEORGE BECKER,
Plaintiff
v.
PHILCO CORPORATION,
Defendant
Civil Action No. 3081

JAMES J. TAGLIA,
Plaintiff
v.
PHILCO CORPORATION,
Defendant
Civil Action No. 3082

MEMORANDUM OPINION

These are suits for libel. The Defendant pleads absolute privilege and moved to dismiss on that ground. Affidavits and exhibits were introduced in support of the motion, converting it to a motion for summary judgment. (Rule 12(b), Federal Rules of Civil Procedure.)

The gravamen of both complaints is that a former employee of Philco Corporation, one Patricia Poole, under date of July 17, 1963, wrote the security officer of the defendant corporation charging the plaintiffs with violating the Industrial Security Regulations of the United States while they were employees of the Philco Corporation; whereupon Philco made an investigation of the charges, prepared a report and submitted the same to the Department of Defense, resulting in the suspension of the Plaintiffs' security clearance by the Department of Defense. Lacking security clearance, plaintiffs lost their employment with the Philco Corporation.

Plaintiffs allege the statements made in the report by the Philco Corporation to the Defense Department are

completely erroneous, malicious, slanderous and libelous.

The defendant corporation admits that in June of 1962 Patricia Poole, in her capacity as a deputy security officer at Philco's Washington offices, made a telephone report to Joseph M. Transue, Security Director of the Philco Corporation, concerning suspected compromise of classified information involving Leo George Becker and James J. Taglia. The deputy security officer was directed to reduce the report to writing, and upon receipt thereof the security officer conducted an investigation of the circumstances reported. The results of this inquiry were then turned over to Robert M. Jones, Vice President of Philco Corporation in charge of industrial relations, for action in accordance with the requirements of the Department of Defense Industrial Security Manual for safeguarding classified information and the Security Agreement with the Defense Department. Mr. Jones participated in further inquiry of the subject matter which included informing both Mr. Becker and Mr. Taglia of the nature of the report and affording them a full opportunity to be heard, and permitting them to make statements concerning the matter under investigation. A report of the matter was then made to the Defense Department by Philco Corporation. These reports and all matters in connection therewith were handled in a confidential manner.

Philco Corporation is a defense contractor of the United States and as a prerequisite to performing work for the Department of Defense has executed a Department of Defense Security Agreement which provides, inter alia:

> "Paragraph 1(A) DD Form 441 SECURITY CONTROLS.
>
> "A. The contractor agrees to provide and maintain a system of security controls within its or his own organization in accordance with the requirements

of the Department of Defense Industrial Security Manual for Safeguarding Classified Information attached hereto and made a part of this agreement . . . . In order to place in effect such security controls, the contractor further agrees to prepare standard practice procedures for its or his own use, such procedures to be consistent with the Department of Defense Industrial Security Manual for Safeguarding Classified Information."

The Industrial Security Manual above referred to required, among other things:

"Paragraph 5. GENERAL REQUIREMENTS - The contractor shall be responsible for safeguarding all classified information under his control. In the furtherance of this requirement, the contractor:

"a. Shall assure that classified information is furnished or disclosed only to authorized persons. . . .

"b. Shall provide suitable protective measures within his facility for the safeguarding of classified information. . . .

"Paragraph 6. REPORTS - The contractor shall submit immediately to the cognizant security officer - . . . .

"b. A report, classified if appropriate, of any loss, compromise, or suspected compromise of classified information. . . .

"Paragraph 14.1. LOSS, COMPROMISE OR SUSPECTED COMPROMISE OF CLASSIFIED INFORMATION.

"a. The contractor shall establish procedures to insure that each loss, compromise or suspected compromise of classified information is immediately reported to the appropriate official of the contractor having responsibility for security within the facility. Classified information which cannot be located shall be presumed to be lost until an investigation by the cognizant military department determines otherwise.

"b. Immediately upon receipt of such a report, the contractor shall initiate an inquiry to ascertain all of the circumstances of the loss or compromise. In the event of loss, a thorough search

shall be conducted for the classified information.

"c. The contractor shall make an immediate report of the incident to the cognizant security office in accordance with paragraph 6.b."

The Philco Corporation Security Digest, which implements the Industrial Security Manual for safeguarding classified information, provides, inter alia, that all cleared personnel are responsible for:

"(b) Reporting all violators and violations of Security Regulations, to the Security Officer assigned at a facility, and/or to the Corporate Security Director.

"(c) Reporting the suspicious conduct or unusual interest in classified information, of any person, beyond normal requirements on a NEED TO KNOW basis."

The plaintiffs concede that Philco Officers and employees are required to conform to the foregoing provisions in re the reporting of actual or suspected security violations to the Department of Defense, but say such is not material to the determination of the motion here under consideration.

The facts first to be determined in these cases, say the plaintiffs, are:

(1) Were the documents obtained by James J. Taglia and Leo G. Becker outside the normal course of their employment by the Philco Corporation;

(2) were the documents, in fact, classified information;

(3) was the defendant required under the terms of its contract to report the activities of the plaintiffs with reference to the two documents in question; and

(4) did the defendant, in making a libelous report, comply with the provisions of its contract with the United States or was it acting as a volunteer.

Only then can the Court reach the question of whether or not the defendant corporation is entitled to absolute priv-

ilege in reporting the incidents to the Defense Department. We disagree.

Clearly persons performing governmental functions are shielded against the hazards of damage suits resulting from the performance of governmental functions. *Barr v. Matteo*, 360 U.S. 564 (1959); *Poss v. Lieberman*, 299 F.2d 358 (2d Cir. 1962).

The classified information here involved were state secrets.

The conduct of the business of the Defense Department requires that it release classified information to its private defense contractors and in so doing it is mandatory that the United States protect itself against hostile or destructive activities by preventing unauthorized disclosure of classified information relating to the national defense.

The Philco Corporation was such a defense contractor and as such was required by law[1] to report to the Defense Department any compromise or suspected compromise of classified information. In so reporting Philco was a link in the Government's overall systems whereby classified information is protected. It was thus performing a governmental function.

It is the occasion of the publication rather than the publication itself which is determinative of whether or not it is entitled to absolute privilege. Here the occasion was compliance with government security regulations enacted for the protection of state secrets. *Barr v. Matteo, supra; Preble v. Johnson*, 275 F.2d 275 (10th Cir. 1960).

Further, the communication sued upon was circulated only in closely restricted channels. It was not available to anyone except upon a "need to know" basis and has not

[1] The Government's Security Regulations are authorized by Statute. See *Greene v. McElroy*, 360 U.S. 474.

been published or otherwise made available to the public.

To subject Philco, in performing its duty of reporting the compromise or suspected compromise of classified information to the Department of Defense, to "the burden of a trial and to the inevitable danger of its outcome would," in the language of Judge Learned Hand, "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." See *Gregoire v. Biddle*, 177 F.2d 579.

Summary judgment for the defendant will be granted.

Counsel for the defendant should prepare an appropriate order dismissing the suits, submit it to counsel for the plaintiffs for approval as to form, and it will be entered accordingly.

September 4th, 1964. /s/ OREN R. LEWIS
United States District Judge

Order Denying Motion for Reconsideration

ORDER

Upon examination and due consideration of the matter and things therein contained, the plaintiffs' motion for reconsideration, filed herein September 25, 1964, is denied.

October 1, 1964 /s/ OREN R. LEWIS
United States District Judge

APPENDIX C

DEPARTMENT OF DEFENSE SECURITY AGREEMENT

This Agreement, entered into this 11th day of December, 1961, by and between the United States of America through the Department of Navy, acting for the Department of Defense (hereinafter called the Government) and Philco Corporation a corporation organized and existing under the laws of the State of Delaware * * * with its principal office and place of business at Tioga and "C" Streets in the City of Philadelphia State of Pennsylvania (hereinafter called the Contractor).

WITNESSETH THAT:

WHEREAS, the Government, through the Department of the Army, the Department of the Navy and/or the Department of the Air Force, has in the past purchased or may in the future purchase from the contractor supplies or services which are required and necessary to the national defense of the United States; or may invite bids or request quotations on proposed contracts for the purchase of supplies or services which are required and necessary to the national defense of the United States, and

WHEREAS it is essential that certain security measures be taken by the Contractor prior to and after his being accorded access to classified information; and

WHEREAS the parties desire to define and set forth the precautions and specific safeguards to be taken by the Contractor and the Government in order to preserve and maintain the security of the United States through the prevention of improper disclosure of classified information derived from matters affecting the national defense; sabotage; or any other act detrimental to the security of the United States:

NOW, THEREFORE in consideration of the foregoing and of the mutual promises herein contained, the parties hereto agree as follows:

SECTION I – SECURITY CONTROLS

(A) The Contractor agrees to provide and maintain a system of security control, within its or his own organization in accordance with the requirements of the Department of Defense Industrial Security Manual for Safeguarding Classified Information attached hereto and made a part of this agreement, subject, however, (i) to any revisions of the Manual required by the demands of national security as determined by the Government, notice of which has been furnished to the Contractor, and (ii) to mutual agreements entered into by the parties in order to adapt the Manual to the Contractor's business and necessary procedures thereunder. In order to place in effect such security controls, the Contractor further agrees to prepare Standard Practice Procedures for its own use, such procedures to be consistent with the Department of Defense Industrial Security Manual for Safeguarding Classified Information. In the event of any inconsistency between the Contractor's Standard Practice Procedures and the Department of Defense Industrial Security Manual for Safeguarding Classified Information as the same may be revised, the Manual shall control:

(B) The Government agrees that it shall indicate when necessary by security classification (Top Secret, Secret, or Confidential) the degree of importance to the national defense of information pertaining to supplies, services, and other matters to be furnished by the Contractor to the Government or the Government to the Contractor, and the Government shall give written notice of such security classification to the Contractor and of any subsequent changes thereof; provided, however, that matters requiring security classification will be assigned the least restrictive security classification consistent with proper safeguarding of the matter concerned since

overclassification causes unnecessary operational delays and depreciates the importance of correctly classified matter. Further, the Government agrees that when Atomic Energy information is involved it will when necessary indicate by a marking additional to the classification marking that the information is "Restricted Data — Atomic Energy Act, 1946." The Contractor is authorized to rely on any letter or other written instrument signed by the contracting officer changing the classification of matter. The Government also agrees upon written application of the Contractor to designate employees of the Contractor who may have access to information classified Top Secret or Secret or to information classified Confidential when "Restricted Data" is involved, or to matter involving research, development, or production, of cryptographic equipment, regardless of its military classification; and alien employees to have access to any classified matter, or in the case of contracts for furnishing or constructing aircraft, aircraft parts, or aeronautical accessories, to have access to the plans or specifications, or to the work under construction, or to participate in the contract trials, whether such aeronautical contracts are classified or not.

(C) The Contractor agrees that it or he shall determine that any subcontractor, subbidder, individual, or organization proposed by it or him for the furnishing of supplies or services which will involve access to classified information in its or his custody has executed a Department of Defense Security Agreement which is still in effect, with any Military Department, prior to being accorded access to such classified information.

SECTION II -- INSPECTION

Designated representatives of the Government responsible for inspection pertaining to industrial plant security shall have the right to inspect at reasonable intervals the procedures, methods, and facilities utilized by the Contractor in complying with the requirements of the terms and conditions of the Department of Defense In-

dustrial Security Manual for Safeguarding Classified Information. Should the Government, through its authorized representative, determine that the Contractor's security methods, procedures, or facilities do not comply with such requirements, it shall submit a written report to the Contractor advising him of the deficiencies.

SECTION III – MODIFICATION

Modification of this security agreement (as distinguished from the Industrial Security Manual for Safeguarding Classified Information, which may be modified in accordance with Section I of this Agreement) may be made only by written agreement of the parties hereto.

SECTION IV – TERMINATION

This agreement shall remain in effect until terminated through the giving of 30 days written notice to the other party of intention to terminate; provided, however, notwithstanding any such termination, the terms and conditions of this agreement shall continue in effect so long as the Contractor has classified information in his possession or under his control.

SECTION V – PRIOR SECURITY AGREEMENTS

As of the date hereof, this security agreement replaces and succeeds any and all prior security or secrecy agreements, understandings, and representations with respect to the subject matter included herein, entered into between the Contractor and the Department of the Army, the Department of the Navy, and/or the Department of the Air Force: Provided, That the term "security or secrecy agreements, understandings, and representations" shall not include agreements, understandings, and representations contained in contracts for the furnishing of supplies or services to the Government heretofore entered into between the Contractor and the Department of the Army, the Department of the Navy, and/or the Department of the Air Force.

SECTION VI -- SECURITY COSTS

This agreement does not obligate Government funds, and the Government shall not be liable for any costs or claims of the Contractor arising out of this agreement or instructions issued hereunder. It is recognized, however, that the parties may provide in other written contracts for security costs which may be properly chargeable thereto.

IN WITNESS WHEREOF, the parties hereto have executed this agreement as of the day and year first above written:

THE UNITED STATES OF AMERICA

By: W. W. Pankoe
Industrial Security Director
Inspector of Naval Material,
Philadelphia

THE PHILCO CORPORATION

By: Robert M. Jones
Vice President-Industrial
Relations

[Certificate]

I, H. R. Nolte, Jr, certify that I am the Secretary of the corporation named as Contractor herein; that Robert M. Jones who signed this agreement on behalf of the Contractor, was then a Vice President of said corporation, that said agreement was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

/s/ H. R. Nolte, Jr.

Supreme Court, U.S.
FILED
JUN 8 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1373~~ 145

LEO GEORGE BECKER
and
JAMES JUDE TAGLIA,

Petitioners,

v.

PHILCO CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1373

LEO GEORGE BECKER
and
JAMES JUDE TAGLIA,

Petitioners,

v.

PHILCO CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 372 F.2d 771. The opinion of the United States District Court for the Eastern District of Virginia is reported at 234 F. Supp. 10. These opinions are attached as Exhibits A and B, respectively, to the Petition.

JURISDICTION

The jurisdictional grounds in this case have been adequately stated in the Petition.

QUESTION PRESENTED

The question presented in this case is not that stated by petitioners.

The narrow question instead is: *Does a tort action for libel lie against a private defense contractor fulfilling its governmentally imposed duty to inform the Government of suspected security violations?*

REGULATIONS INVOLVED

In addition to the Regulations set forth by petitioners, the following Armed Services Procurement Regulations are involved in this case. These regulations require insertion in all Government contracts whose performance involves access to classified information of the following contract clause:

> "(a) The provisions of this clause shall apply to the extent that this contract involves access to information classified 'Confidential' including 'Confidential–Modified Handling Authorized' or higher. * * * (c) To the extent the Government has indicated as of the date of this contract or thereafter indicates security classification under this contract as provided in paragraph (b) above, the Contractor shall safeguard all classified elements of this contract and shall provide and maintain a system of security controls within his own organization in accordance with the requirements of – (i) the Security Agreement (DD Form 441), including the Department of Defense Industrial Security Manual for Safeguarding Classified Information as in effect on the date of this contract, and any modification to the Security Agreement for the purpose of adapting the Manual to the Contractor's business; and (ii) any amendments to said Manual made after the date of this contract, notice of which has

been furnished to the Contractor by the Security Office of the Military Department having security cognizance over the facility." See 32 C.F.R. § 7.104-12 (1967) (Fixed Price Supply Contracts); 32 C.F.R. § 7.204-12 (1967) (Cost Reimbursement Type Supply Contracts); 32 C.F.R. § 7.302-25 (Fixed Price Research Contracts); 32 C.F.R. § 7.402-24 (1967) (Cost Reimbursement Type Research Contracts).

Also involved in this case are the Department of Defense Industrial Security Manual provisions referred to in the above Regulations:

"Paragraph 5. GENERAL REQUIREMENTS - The Contractor shall be responsible for safeguarding all classified information under his control. In the furtherance of this requirement, the contractor:

"a. Shall assure that classified information is furnished or disclosed only to authorized persons . . .

"b. Shall provide suitable protective measures within his facility for the safeguarding of classified information . . .

"Paragraph 6. REPORTS - The contractor shall submit immediately to the cognizant security officer - . . .

"b. A report, classified if appropriate, of any loss, compromise, or suspected compromise of classified information . . .

* * *

"d. A report, classified if appropriate, of any information coming to his attention concerning any of his employees having access, or who are in the process of being cleared for access, to classified information which indicates that such access is not, or would not be, clearly consistent with the interest of national defense . . .

"Paragraph 14.1. LOSS, COMPROMISE OR SUSPECTED COMPROMISE OF CLASSIFIED INFORMATION

"a. The contractor shall establish procedures to insure that each loss, compromise or suspected compromise of classified information is immediately re-

ported to the appropriate official of the contractor having responsibility for security within the facility . . .

"b. Immediately upon receipt of such a report, the contractor shall initiate an inquiry to ascertain all of the circumstances of the loss or compromise. . . .

"c. The contractor shall make an immediate report of the incident to the cognizant security office in accordance with paragraph 6.b."

STATEMENT OF THE CASE

These are simple tort actions for libel (consolidated below), based on a report submitted to the Department of Defense by respondent Philco Corporation. This report, of an actual or suspected breach by petitioners of Government security regulations regarding classified Government defense information, was required by respondent's defense contract with the United States and was submitted on an internal and confidential basis.

In order that defense contracts for the United States Department of Defense could be performed, certain State Secrets in the form of classified information relating to national defense matters were disclosed by the Government to Philco.[1] To insure against the loss or compromise of this classified information, the Government imposed upon Philco the express responsibility for safeguarding all such information through a system of security controls required specifically in the Armed Services Procurement Regulations, in Philco's contract with the Government, in the Security Agreement executed as a condition precedent thereto and finally in the Department of Defense Industrial Security Manual For Safeguarding Classified Information, expressly incorporated by reference in the Regulations, Contract and Security Agreement.[2]

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[1] Affidavit of Walter T. Skallerup, Appendix to Appellee's Brief to the Court of Appeals (hereinafter referred to as Appellee's Appendix), p. A. 1.

[2] Armed Services Procurement Regulations, see, e.g. 32 C.F.R., § 7.104-12; Skallerup affidavit, paras. 2, 3; Appellee's Appendix p. A. 2.

These provisions specifically required Philco to establish a security control system under the supervision of assigned security officers who were under obligation to report "any loss, compromise, or suspected compromise of classified information", all other actual or suspected security violations and all information concerning employees holding security clearances indicating they might be security risks.[3] Upon receipt of such a report Philco was required to investigate the circumstances of the alleged violation and then to make a report on the matter to the Department of Defense.[4]

Neither Philco nor its Security officers had any discretion in reporting suspected security violations or security risks. However, all reports submitted to the Department of Defense are treated as confidential documents, not distributed outside that Department and available within the Department only upon a strict "need to know" basis.[5]

The controversy in this case had its origin in a report submitted by the designated deputy security officer at Philco's Washington Office to Philco's Security Director, charging the petitioners, who at the time were Philco employees with access to classified information, with violating the Government's Industrial Security Regulations by compromising classified information.[6] Upon receipt of the report, Philco made an investigation[7] and in accordance with the procedure outlined above, submitted a confidential report on the matter to the Department of Defense.[8]

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[3]Department of Defense Industrial Security Manual, paras. 5, 14.1; Skallerup affidavit, paras. 3, 4, 5; Appellee's Appendix, pp. A.2 – A.5.

[4]Department of Defense Industrial Security Manual, para. 14.1(b)(c).

[5]Skallerup affidavit, para. 8; Appellee's Appendix, p. A.7.

[6]See affidavit of Joseph M. Transue, para. 2; Appellee's Appendix, pp. A. 11 – A. 12. See also Appendix to Appellants' Brief to the Court of Appeals; J.A. 8-9, 11.

[7]Transue affidavit, para. 2; Appellee's Appendix, pp. A. 11 – A. 12.

[8]Affidavit of Robert M. Jones, para. 7; Appellee's Appendix, p. A. 10.

Philco's report set in motion the Department of Defense's Industrial Personnel Access Authorization Review Procedures.[9] After an investigation and administrative hearing to determine the truth or falsity of the report's allegations, described in the Appendix to the Supplemental Brief of Appellee before the Court of Appeals, petitioners' Department of Defense security clearances were permanently suspended. These proceedings are the subject of a separate suit by petitioners against the United States, now pending in the United States District Court for the District of Columbia, and their legality or propriety is not involved here.

Petitioners' libel suit against Philco is based solely on this confidential report submitted, as required, to the Department of Defense. Philco moved in the United States District Court for the Eastern District of Virginia, where the action was brought, for summary judgment in its favor on the grounds the report was absolutely privileged: (1) as an act in performance of the governmental function of safeguarding national defense information which it was required to perform by Government Regulations and contract and; (2) as an integral part of the quasi-judicial administrative proceedings in the Department of Defense which the report set in motion. The District Court granted respondent's motion for summary judgment on the first of these two grounds and the United States Court of Appeals for the Fourth Circuit in unanimous opinion by Judges Bryan, Haynsworth and Sobeloff affirmed.

ARGUMENT

1. No Constitutional Issues Raised.

No claim of violation of any constitutional right was made by petitioners either in the trial court, in the Court of Appeals or in their petition filed in this Court. As the Court of Appeals states: "Our decision only determines that an action for libel will not lie in the circumstances against a

[9] Skallerup affidavit, para. 7; Appellee's Appendix, p. A. 6.

private party fulfilling its governmentally imposed duty to inform".

The petitioners do claim that the Security Clearance proceedings in the Department of Defense did not comply with Due Process requirements. However, as the Court of Appeals specifically noted, "Whether they [the administrative proceedings] give adequate redress or whether other remedies are available are questions not intended to be answered here". In any event, petitioners have instituted a separate suit against the Secretary of Defense in the United States District Court for the District of Columbia. It is only there that the Due Process issue, if it exists, can and should be determined – certainly not here.

2. There Is No Conflict of Decision.

Significantly, petitioners do not actually claim that the decision of the Court of Appeals conflicts with any relevant precedent, simply that there is no "decision by this Court" on the question presented.[10] Actually, as pointed out in the decision of the Court of Appeals, this case falls squarely within the doctrine of *Barr v. Matteo*,[11] that acts in performance of a governmental function are absolutely privileged and

[10] The Fifth Circuit decision in *Fowler v. Southern Bell Tel. & Tel. Co.*, 1965, 343 F.2d 150, holding that a private party is entitled to absolute privilege when performing a governmental function, is expressly in point and consistent with the Fourth Circuit's decision in this case. There are several decisions of the lower Federal courts supporting the present decision. See Appellee's Brief before Court of Appeals, p. 13 note 26. The only decision cited by petitioners to the Court of Appeals in an attempt to counter this line of authority was *Foltz v. Moore-McCormack Lines*, 2 Cir. 1951, 189 F.2d 537, cert. denied, 342 U.S. 871. That case is not in point and is not inconsistent with the decision in this case since *Foltz* involved *volunteered* information whereas Philco's report was *compelled* both by contract and regulations having the force and effect of law. Apparently for this reason, petitioners have abandoned their reliance on *Foltz* since the decision is not mentioned in their Petition here.

[11] 360 U.S. 564.

must not be made the subject of a libel action because those performing governmental functions "should be free to exercise their duties unembarrassed by the fear of damage suits"; that the application of this privilege is to be determined by the relationship of the acts to the "effective functioning of Government" rather than by who performs them; and that the complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority. This decision was reaffirmed by this Court as recently as 1964 in *New York Times v. Sullivan*, 376 U.S. 254, 282, and is controlling here.

Again, as the Court of Appeals pointed out, the facts here present greater justification for granting an absolute privilege than those in *Barr v. Matteo*, since Philco's report was compelled both by Government regulation[12] and by Philco's contract with the Government, and it was not only submitted to the Department of Defense on a strictly internal and confidential basis[13] but handled in such a fashion by both the Department of Defense and respondent Philco Corporation.

Clearly there is no conflict of decision necessitating review by this Court.

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[12]It is established that the provisions of the Armed Services Procurement Regulations have the force and effect of law. *Paul v. United States*, 1963, 371 U.S. 245; *G. L. Christian & Assoc. v. United States*, Ct. Cl. 1963, 312 F.2d 418, cert. denied, 375 U.S. 954.

[13]The crucial importance of this distinction was recognized even by the principal dissenters in *Barr* who conceded that an internal, confidential, governmental report, such as here, is entitled to absolute privilege. 360 U.S. at 582.

3. No Broad or Important Questions of Law Affecting the Public Interest.

The Court of Appeals' decision in this case "only determines that an action for libel will not lie in the circumstances against a private party fulfilling its governmentally imposed duty to inform." This case is a private tort action – nothing more.

The fact that classified defense information potentially affecting the national interest happens to be involved here and that the mechanics of the Government's security program for protecting such information are also involved, does not mean that this tort action for libel *must* affect the public interest. The only material point here is the undisputed fact that the Government has no choice but to share with the private defense contractor joint responsibility for the protection of classified Government defense information released to the contractor for use in the performance of its contract. Obviously, this simple tort action is not the proper vehicle for challenging the Government's right to take appropriate steps to protect such information, including the delegation of authority necessary to accomplish this purpose, particularly since the Government is not a party to this action – unlike the situation with respect to the suit brought by these same petitioners against the United States to challenge the constitutionality of the Government's internal security administrative proceedings.[14]

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[14] The Court of Appeals' decision in this private tort action can also be justified on two other grounds which that court found unnecessary to discuss: (1) that Philco's report was absolutely privileged as an integral part of the quasi-judicial administrative proceedings in the Department of Defense which it set into motion, *Holmes v. Eddy*, 4 Cir. 1965, 341 F.2d 477, cert. denied, 382 U.S. 892, and other cases cited on pp. 26-33 of Appellee's brief before the Court of Appeals and; (2) that there was no actionable publication of the report since it was submitted to the Department of Defense on a strictly internal and confidential basis. *Holmes v. Eddy, supra.*

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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